In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1579

CHARLES A. MIELE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of committing mail fraud, in violation of 18 U.S.C. 1341 and 1342, of aiding and abetting the commission of mail fraud by others, in violation of 18 U.S.C. 2, and of conspiring to commit mail fraud, in violation of 18 U.S.C. 371. He was sentenced to three years' imprisonment (to be served concurrently) on each of nine separate counts, and three years' imprisonment (to be served concurrently with each other but consecutively to the first sentence) on each of nine remaining counts. The court of appeals affirmed without opinion (Pet. App. 2).

Petitioner, together with several co-conspirators, was a principal in a scheme to defraud potential commercial borrowers. Petitioner contends that he was denied a fair trial because of plea bargaining between the prosecution and petitioner's co-conspirators, and further urges prejudice in the admission of an accomplice's testimony, first referred to by defense counsel, concerning a telephone conversation in which he urged petitioner to plead guilty.

1. While not contending that plea bargaining is itself unlawful (see *Santobello* v. *New York*, 404 U.S. 257, 260-261), petitioner challenges the plea bargaining agreements negotiated prior to trial between the prosecution and six co-conspirators, as "virtually guarantee[ing] a prosecution-stacked deck against one man" and thereby denying him the right to a fair trial (Pet. 8).

The courts have long recognized that accomplices who offer to testify in the hope of receiving reduced sentences or lenient treatment are not disqualified from appearing as witnesses against the remaining defendants, provided the circumstances surrounding their testimony are made known to the jury. *Caminetti* v. *United States*, 242 U.S. 470, 495; *United States* v. *Stanley*, 433 F. 2d 637 (C.A. 5); *Williamson* v. *United States*, 365 F. 2d 12, 14 (C.A. 5). Judgments as to such witnesses' credibility are for the jury alone. *Pierce* v. *United States*, 252 U.S. 239, 251-252; *Williamson* v. *United States, supra; Doherty* v. *United States*, 230 F. 2d 605 (C.A. 9).

In the instant case great care was taken to safeguard petitioner's right to a fair trial by assuring the defense a full opportunity, in the presence of the jury,

to explore the accomplices' motives in testifying. Defense counsel was furnished in advance of the co-conspirators' testimony copies of the plea bargaining agreement and transcripts of all proceedings wherein they entered pleas of guilty (R. 305-344, 668-690, 808-812, 941-958, 1087-1097, 1301-1311, 1375-1389).[1] The trial judge properly admonished the jury to examine the accomplice testimony with great care (SSR. 324-326).

2. Petitioner challenges the admission, on redirect examination, of testimony by co-conspirator Fox as to the substance of a telephone conversation between Fox and petitioner approximately two months before the trial (R. 311-312). On cross-examination of Fox, the defense brought out that Fox had telephoned petitioner at the request of one of the prosecuting attorneys and had urged him to plead guilty. Redirect examination by government counsel developed that petitioner had told Fox he would not be interested in any kind of plea bargaining unless it involved a suspended sentence (R. 357-359). Petitioner's motion for a mistrial based upon this testimony was denied (R. 359-361).

Since the subject of the telephone conversation was first brought out by the defense on cross-examination, the government was entitled to develop the issue fully once it had been injected into the case. Where a witness has been cross-examined as to part of a transaction, then the whole transaction, to the extent it relates to the same subject matter, may be elicited

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[1] "R." denotes the record on appeal, "SR" the supplemental record on appeal, and "SSR" the second supplemental record on appeal.

on redirect examination. *United States* v. *Walker,* 421 F. 2d 1298 (C.A. 3); *Harrison* v. *United States,* 387 F. 2d 614 (C.A. 5). Thus the testimony was properly admitted.

Petitioner's reliance on the exclusionary rule of *Massiah* v. *United States,* 377 U.S. 201, is misplaced. In *Massiah* the prosecution introduced, as direct evidence, incriminating statements deliberately elicted by government agents in the absence of Massiah's counsel. Here, the substance of petitioner's conversation with Fox was introduced by the defense, apparently to test Fox's credibility. The prosecuting attorney did no more than elicit the balance of the subject matter into which the defense had already inquired.

In any event, if the admission of this testimony constituted error, it was "harmless beyond a reasonable doubt" (*Chapman* v. *California,* 386 U.S. 17, 24) when weighed against the overwhelming proof of petitioner's guilt from other evidence.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JULY 1973.